
In the United States Bankruptcy Court
for the
Southern District of Georgia
Statesboro Division

In the matter of:)	
)	Chapter 13 Case
JIMMY W. SALYER))	
)	Number <u>91-60201</u>
<i>Debtor</i>)	

ORDER ON TRUSTEE'S MOTION TO RECONSIDER

The above-captioned case was filed on April 1, 1991, under provisions of Chapter 13 of the Bankruptcy Code. Paragraph four of Debtor's Amended Chapter 13 Plan dated July 16, 1991, provided:

The debt to 1st Wachovia Student Financial Services, Inc., and/or Georgia Student Financial Commission for student loans are discharged on confirmation except as to the percentage payout provided under the plan as payment will impose an undue hardship on the debtor and debtor's dependant [sic].

On August 28, 1991, a hearing was held to consider the Debtor's plan as amended. The Trustee recommended confirmation and projected that at a rate of \$25.00 weekly the plan would pay a dividend of approximately 43% to unsecured creditors. The Court ruled that the plan would be confirmed by subsequent written order. On September 3, 1991, the

Trustee filed its Motion to Reconsider setting forth that claims 2 and 3 of the Georgia Higher Education Assistance Corporation were classified as general unsecured claims that would receive only a pro-rata payout similar to that of other unsecured claims, that said claims appeared to be student loans not subject to inclusion in the Debtor's discharge and asserting that said claims would have to be fully funded within the Chapter 13 case. As a result of that this Court declined to issue its order of confirmation. In consideration of 11 U.S.C. Section 1328(a)(2) this Court concludes that it should reconsider its announced intent to confirm the plan in order that a continued confirmation hearing be scheduled. Section 1328 provides in relevant part:

After completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan . . . except any debt of the kind specified in section . . . 523(a)(8).

11 U.S.C. Section 523(a)(8) provides an exception to the discharge in a Chapter 7 case for certain educational benefits or loans insured or guaranteed by governmental units unless such loan or benefit became due and payable more than seven years before the date of filing of the bankruptcy petition or unless the excepting of such debt from the discharge imposes an undue hardship on the debtor and debtor's dependents. The provisions of Section 1328 incorporating Section 523(a)(8) discharge exceptions were recently added by Congress in a clear effort to halt abuses in government guaranteed student loan programs. As a result of these changes, debtors in most cases must now fully fund government guaranteed student

loans within the Chapter 13 plan. In response to the amendments to Section 1328 some debtors in this district have filed plans that provide for minimal payments to the holder of a claim based on a government guaranteed student loan together with an acknowledgement that the balance of said indebtedness remains free of the discharge at the end of the three to five year plan period. This Court has approved payment of less than 100% of a government guaranteed student loan within the life of a plan under the provisions of 11 U.S.C. Section 1322(b)(5) when a debtor is unable to fully fund the entire student loan balance within a five year period but wishes to maintain the payments called for under the note during the pendency of the plan and agrees that the remaining balance is excepted from discharge. However, in cases where less than the monthly contractual payment obligation is proposed to the student loan creditor and 100% of the balance is not paid during the term of the plan I have ruled that the plan does not meet the good faith requirement of 11 U.S.C. Section 325(a)(3). The potential here for abuse is immense. If approved by this Court such a payment provision to modify the monthly payment and extend the payment beyond five years could result in a nearly indefinite extension of a student loan obligation. If a debtor pays for example 5% of a student loan obligation over a five year period and stipulates that the balance is excepted from discharge nothing would prevent the filing of successive Chapter 13 plans providing for similar low percentage repayments. Theoretically, the debtor would "rollover" the student loan balance continually. To permit such plans would clearly circumvent the intent of Congress as expressed in Section 1328. Therefore, I have refused to confirm plans which deal with student loan obligations unless they (a) provide for

payment of the total obligation in full within five years even if the contractual monthly payment is modified as permitted by Section 1322(b)(2) or (b) provide for a minimal monthly payment to the creditor which is equal to that required pre-petition under the loan documents with the balance at the end of the five year period to be excepted from discharge under the authority of Section 1322(b)(5).

Debtor's plan in this case provides for neither treatment but proposes an additional variation. In paragraph four the plan proposes to have this Court make a determination that payment in full of the student obligation would constitute an undue hardship on Debtor or Debtor's dependents and therefore seeks to bring himself within the exception of 11 U.S.C. Section 523(a)(8)(B). I conclude, however, that such a provision is an impermissible provision for inclusion in a Chapter 13 plan. Bankruptcy Rule 7001 provides that adversary proceedings include actions "to determine the dischargeability of a debt." The procedural safeguards inherent in adversary proceedings are intended to insure the highest degree of notice and an opportunity for hearing in any case where determination of dischargeability of a debt is proposed. Although the Debtor's intent to have such determination made was clearly reflected within the provisions of his plan, such notice does not meet the requirements of Part 7 of the Bankruptcy Rules which govern adversary proceedings and therefore is an insufficient procedural foundation on which this Court could permissibly determine the balance of the student loan obligation to be discharged. In view of the fact that Debtor's plan does not conform to the previous rulings of this Court as to the

proper treatment of student loans under 11 U.S.C. Section 1328 and because Rule 7001 has not been complied with I conclude that the verbal announcement that the plan would be confirmed should be reconsidered. The Clerk will issue a notice to the Debtor and all parties in interest rescheduling a hearing on confirmation in this case. Debtor's counsel shall file an amended plan to conform to the requirements of this Order or an adversary proceeding to determine the Section 1328 issues within a period of twenty (20) days of receipt of service of this Order.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of December, 1991.